

RE: Federal Preemption on Local Zoning/Control of Cellular Towers and Wireless Facilities

DATE: September, 2008

Summary: The Federal Communications Commission ("FCC") has put on a fast track, presumably so it can be completed before a change in administrations, a proceeding to effectively preempt local zoning of cellular towers. This flies in the face of Federalism, traditional Local Control of Land Use and Federal statutes intended to preserve authority over the location, height, construction and modification of Personal Communications Service Facilities and the impact of such. Further, it flies in the face of the plain language of the 1996 Telecommunications Act, which expressly and deliberately does nothing to abrogate the rights of local governments to determine matters related to the location, construction and modification of towers and wireless facilities.

FCC Proceeding: A petition by the cellular industry to preempt local zoning with "shot clocks", etc. as set forth below.

1. A fixed deadline of 75 days from filing for "final action" by municipalities on applications for zoning approval for new cellular towers and antennas.
 - a. If the 75-day deadline is not met, the zoning approval is automatically deemed granted!
2. A similar deadline of 45 days for applications for zoning approvals to add cellular antennas to existing towers.
 - a. Again, with zoning approval automatically deemed granted if the deadline is not met.
3. Preempt zoning ordinances where variances are required for cell towers. In other words, if a local government requires a variance for a cell tower, the FCC would preempt and cell companies will likely argue that no local zoning approval is needed!
4. Preempt local governments' ability to consider whether other cell companies provide service in the area and determining whether there is actually a "gap" in coverage warranting a new tower or whether the new facility is simply to gain a competitive advantage or allow a new revenue stream/source. It draws no distinction between a functional "Need" and a mere "Desire".
5. The 1996 Telecommunications Act already expressly guarantees service providers of expedited treatment by the courts in the case of inaction or unwarranted action by a local government.

Analysis: The FCC proceeding is unwarranted, and is a major threat to local control. It attempts to force a "one size fits all" set of rules on 35,000 municipalities nationwide in violation of the principal of Federalism, FCC statutes, local procedures, the wide variation in municipalities, and the fact that each cell tower zoning application is unique and each situation normally has multiple siting and technical options or alternatives. Local governments need to be able to achieve a balance of needs between the applicant and the public interest and safety. Complex or contentious applications may take well more than 75 days to resolve. Among other things:

1. There is **no showing of a "crisis" or a problem** with cell tower zoning. The several hundred thousand cell towers already in place show this. In fact, history has proven that in the vast majority of cases, **permits for towers and wireless facilities are granted much faster than the companies build them** and they end up **warehousing the permits** for up to two years in some cases. The industry can almost always be relied upon to argue a condition of the permit that requires the facility to be built and operating within a given amount of time, e.g. 120 days from the grant of the permit.
2. The proposed deadlines ignore the fact that many applications are **not complete** and do not provide the information (required by local law) to enable an informed decision to be made. Any deadlines should be tied to the provision of a "complete" application.

3. The deadlines **ignore the time needed to resolve complex and contentious cases**, such as towers in residential areas affecting property values and severely limiting public input through public hearings.
4. The proposed deadlines **encourage bad zoning applications** - - The worse the application, the longer it will take to process, and the more likely (under the FCC proposal) that it will be "deemed approved" as filed.
5. The deadlines do not allow for myriad issues to be adequately addressed, i.e. more than twenty issues, including, but far from limited to, **issues of physical safety and the structural integrity of towers** that are being co-located on. It is the exception when an existing tower passes an independent 3rd party Professional Engineering safety inspection under EIA/TIA 222 (F) as regards the physical condition/safety of the existing tower, as this is essentially a self-policing situation, in spite of the fact that in 2008 to-date alone **there have been more deaths per thousand workers than any industry in the nation**, according to OSHA's figures.
6. The deadlines **ignore state laws and local procedures** - - such as the need to notify area residents, notice requirements for meetings vis-à-vis minimum timing for notice, the fact that zoning bodies don't meet daily or weekly, and citizen's ability to appeal decisions from (for example) a zoning body to a board of zoning appeals or to a city council. In fact, **deadlines provide incentives for cell companies to delay and appeal zoning matters** within a community so as to ensure that a deadline is not met.
7. The proposed deadlines may result in the **elimination of a citizen's legal or appellant rights**.
8. **Zoning is - - and always has been - - a matter of local concern**. Congress has generally maintained that local zoning (of cell towers and wireless facilities) is where the issue should be regulated, since that is where the effects are felt, not at the state or federal level. The FCC cannot be the "local zoning board" for cell towers nationwide.

PHOTOGRAPHIC EXHIBITS, I.E. PROOF OF PROBLEMS

The following are but a few examples (proof) of issues that can only be prevented with local regulation and the time needed to deal with them vis-à-vis industry arguments about the lack of affect. Situations such as these always need time (and local regulatory authority) to address and prevent or remedy.

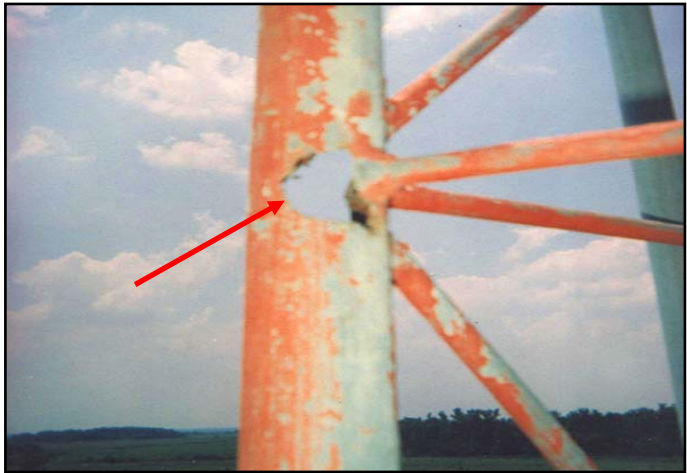
Issue: Safety – Structural Adequacy and Integrity



Guyed towers, which industry engineers argue that by design “definition” can’t fall in their entirety



Monopole that industry engineers say are designed with a Break Point so as not to fall in their entirety.



Lattice tower with hole rusted entirely through a main support leg.



Lattice tower with main support leg rusted entirely through. The only thing holding the tower up is the clamp that did not rust.



Foundation cracked by lightning strike on *improperly grounded* tower, seriously jeopardizing the ability of the foundation to support the tower.

Issue: Unneeded (Duplicative) Towers



**Issue: Towers in Residential Neighborhoods (Negatively Affecting Property Values)
& Safety re Inadequate Fall Zones (Towers would fall on homes, if they collapsed)**

